

FEDERAL CIRCUIT COURT OF AUSTRALIA

NGUYEN & ANOR v MINISTER FOR
IMMIGRATION & ANOR

[2013] FCCA 1441

Catchwords:

MIGRATION – Application for an extension of time and for judicial review of decision of Migration Review Tribunal not to grant a Partner Visa – whether Tribunal based its decision on speculation and suspicion rather than reasonably probative evidence – whether decision based on illogical and irrational reasoning.

Legislation:

Marriage Act 1961 (Cth)

Migration Act 1958 (Cth), s.359A, 477

Migration Regulations 1994 (Cth), reg.1.15A

Cases cited:

Fisher v Minister for Immigration and Citizenship and Another (2007) 162 FCR 299; [2007] FCA 591

Khan v Minister for Immigration and Citizenship and Another (2011) 192 FCR 173; [2011] FCAFC 21

Minister for Immigration & Ethnic Affairs v Pochi (1980) 31 ALR 666

Minister for Immigration and Citizenship v SZIAI (2009) 83 ALJR 1123; [2009] HCA 39

Minister for Immigration and Citizenship v SZMDS and Another (2010) 240 CLR 611; [2010] HCA 16

R v Deputy Industrial Injuries Commissioner; ex parte Moore [1965] 1 QB 456

Rawson Finances Pty Ltd v Commissioner of Taxation (2013) 296 ALR 307; [2013] FCAFC 26

Saeed v Minister for Immigration and Citizenship (2010) 241 CLR 252; [2010] HCA 23

SZMFJ v Minister for Immigration & Anor [2009] FMCA 771

SZNI v Minister for Immigration & Anor [2010] FMCA 57

SZNZU v Minister for Immigration & Anor [2010] FMCA 197

SZOOR v Minister for Immigration and Citizenship and Another (2012) 202 FCR 1; [2012] FCAFC 58

SZQUQ v Minister for Immigration & Anor [2012] FMCA 672

Tisdall v Webber (2011) 193 FCR 260; [2011] FCAFC 76

VQAN v Minister for Immigration & Multicultural & Ethnic Affairs [2003] FCA 1541

First Applicant:	THI VUONG NGUYEN
Second Applicant:	TUAN HIEP NGUYEN
First Respondent:	MINISTER FOR IMMIGRATION & CITIZENSHIP
Second Respondent:	MIGRATION REVIEW TRIBUNAL
File Number:	SYG 265 of 2013
Judgment of:	Judge Barnes
Hearing date:	27 June 2013
Date of Last Submission:	11 July 2013
Delivered at:	Sydney
Delivered on:	24 September 2013

REPRESENTATION

Solicitors for the Applicants:	Turner Coulson Immigration Lawyers
Solicitors for the Respondents:	Clayton Utz

ORDERS

- (1) The time in which to seek review of the decision of the Migration Review Tribunal of 26 September 2012 is extended up to and including 13 February 2013.
- (2) The application for review is dismissed.

**FEDERAL CIRCUIT COURT
OF AUSTRALIA**

AT SYDNEY

SYG 265 of 2013

THI VUONG NGUYEN

First Applicant

TUAN HIEP NGUYEN

Second Applicant

And

MINISTER FOR IMMIGRATION & CITIZENSHIP

First Respondent

MIGRATION REVIEW TRIBUNAL

Second Respondent

REASONS FOR JUDGMENT

Extension of Time

1. This is an application for review of a decision of the Migration Review Tribunal dated 26 September 2012. The Tribunal affirmed a decision of a delegate of the First Respondent to refuse to grant the Applicants Partner (Migrant (Class BC)) visas. The First Applicant, Ms Nguyen, relied on her relationship with an Australian citizen, Mr V N Nguyen. She is referred to for convenience as the Applicant. The Second Applicant is the adult son of the Applicant and applied as her dependant.

2. Section 477(1) of the *Migration Act 1958* (Cth) (the Act) provides that an application for judicial review must be made to the Court within 35 days of the date of the migration decision, which in this case would have been by 31 October 2012. The Applicant did not seek judicial review of the Tribunal decision of 26 September 2012 until 13 February 2013. This was some 105 days or nearly 3 and a half months outside the s.477(1) time limit.
3. Under s.477(2) of the Act, the Court may by order extend the 35 day period as it considers appropriate if:
 - (a) *an application for that order has been made in writing to the Federal Circuit Court specifying why the applicant considers that it is necessary in the interests of the administration of justice to make the order; and*
 - (b) *the Federal Circuit Court is satisfied that it is necessary in the interests of the administration of justice to make the order.*
4. In the amended application for review filed on 10 April 2013 the Applicant specified why she considered it necessary in the interests of the administration of justice to extend time as follows:
 1. *I needed time to get enough money to pay for proper legal advice.*
 2. *If I am denied my visa I will lose my husband and my right to remain in Australia with my family.*
5. The amended application was signed by the Applicants' solicitor. There is no affidavit evidence from either of the Applicants as to the basis on which an extension of time is sought, notwithstanding that at the directions hearing they were given the opportunity to file further affidavit evidence.
6. The application for an extension of time and the substantive application were listed for hearing at the same time. In oral submissions the solicitor for the Applicants conceded that there was no affidavit evidence in explanation for the delay, but submitted that it was relevant that the delay was a matter of only a few months and not years. The Applicants submitted that the merits of the substantive application were of particular relevance to whether it was necessary in the interests of

the administration of justice to extend the time under s.477(2) of the Act.

7. It was confirmed that the Applicants relied on two grounds set out in the amended application in support of their application for an extension of time. It was also submitted that it was “*in the interests of justice*” to have decisions of statutory bodies that are vitiated by jurisdictional error reviewed by the Court and that the Respondents would suffer no real prejudice if the extension of time was granted.
8. The solicitor for the Applicants also contended that consequences of the refusal of leave would be that the Applicants would have to return to their home country and that Ms Nguyen’s relationship with her sponsor would be brought to an end.
9. The First Respondent opposed the grant of an extension of time on the basis that a delay of approximately 3 and a half months was a substantial period of time in circumstances where the Applicant’s reasons for the delay were unsupported by any evidence and because the grounds for review were said not to have reasonable prospects of success. In relation to the suggestion that Ms Nguyen would lose her relationship with her sponsor and also her right to remain in Australia, it was pointed out that the Tribunal had (as discussed further below) rejected her claims about the genuineness of her relationship with the sponsor. It was submitted that the consequences of a refusal to extend time in relation to the Applicants’ entitlement to remain in Australia were no different in this case than in any other migration case.
10. The solicitor for the First Respondent submitted that on its facts this case was not a strong case, that the reasoning of the Tribunal was unimpeachable and that the Applicant’s suggestion that the particular factual findings drawn by the Tribunal from the evidence were so unreasonable and defective as to go to jurisdiction was not such as to establish such merit in the substantive application that an extension of time was warranted or to establish jurisdictional error.
11. The issue of whether an extension of time is “*necessary in the interests of the administration of justice*” is to be determined having regard to all the circumstances of the case insofar as that can be done on the evidence before the court. A number of factors are commonly referred

to as relevant under s.477(2)(b) of the Act, including the extent of the delay in commencing proceedings and whether there is a satisfactory explanation for the delay, whether there is any merit in the substantive application, whether there is any prejudice to the respondents in granting an extension of time, the effect on the applicant if an extension is not granted and the interests of the public at large (see *SZMFJ v Minister for Immigration & Anor* [2009] FMCA 771 at [44], *SZNZU v Minister for Immigration & Anor* [2010] FMCA 197 at [52] – [55] and *SZQUQ v Minister for Immigration & Anor* [2012] FMCA 672 at [6]). I have had regard to all the circumstances of this case.

Delay

12. In relation to the delay in commencing these proceedings, the Applicant relied on the statement in her amended application under the heading “*Grounds of application for extension of time*”. Whilst that statement meets the requirements of s.477(2)(a) that an application for an extension of time be made in writing specifying why the applicant considers it is necessary in the interests of the administration of justice to make the order, there is no evidence in support of the Applicant’s contention that she needed the time that passed before filing her application to get enough money to pay for proper legal advice.
13. While the delay in this case was only 3 and a half months this is a not insignificant delay when regard is had to the 35 day time limit. Further, the “*extent of the delay must be balanced against the reason for the delay*” (*WZANW v Minister for Immigration & Anor* [2009] FMCA 1075 at [29]). While it was claimed in the amended application that the Applicant “*needed time to get enough money to pay for proper legal advice*”, the proceedings were in fact commenced at a time when she was self-represented, although she subsequently obtained legal representation. Insofar as it might be seen as implicit in this claim that legal advice was a necessary prerequisite to commencing judicial review proceedings, that has not been shown to be the case.
14. There is no suggestion from the Applicant that she was not notified of the Tribunal decision or of her review rights in a timely manner. It is apparent from the Courtbook that the Applicant had the assistance of a

migration agent/lawyer through the course of the review by the Tribunal.

15. The Applicant has not explained what steps, if any, she took to obtain funds or to obtain legal advice or to commence proceedings after being informed of the Tribunal's decision or how her circumstances, including the asserted lack of funds and/or "*proper legal advice*", prevented her from filing an application for judicial review within the prescribed time limit or at least shortly thereafter. It is apparent that she did obtain representation after she filed the application and before the Amended Application was filed.
16. In the particular circumstances of this case, I am not satisfied that the Applicants have provided an entirely satisfactory explanation for the delay in commencing these proceedings. I have however borne in mind that this factor is not determinative and that regard should be had to all the circumstances of this case.

Other factors

17. I have had regard to the absence of any prejudice to the Respondents and to the impact on the Applicants insofar as that can be considered on the evidence before the Court if time is not extended (in particular the lack of appeal rights as well as possible removal from Australia) as well as the interests of the public at large. I accept that there would be no prejudice to the Respondents if time were to be extended.
18. However, insofar as it was contended that if the Applicant was denied her visa she would lose her husband and her right to remain in Australia with her family, the Tribunal's conclusion was that there was not a valid marriage or a genuine de facto relationship between the Applicant and the sponsor. If it was intended to be contended that the Applicant would be denied the "*right*" to remain in Australia with family members other than her son (who would also be open to the possibility of removal) there is no direct evidence in this respect although I note the reference to a daughter and grandchildren in the material before the Tribunal. However the existence of such family members is not of itself such as to warrant an extension of time to seek

review of the decision of the Tribunal in relation to the Applicant's application for a partner visa.

Merits of the substantive application

19. As Stone J suggested in *Fisher v Minister for Immigration and Citizenship and Another* (2007) 162 FCR 299; [2007] FCA 591 at [35], the concept “*in the interests of the administration of justice*” in s.477(2) (b) involves consideration not only of the reasons for not meeting the original time limit but also whether the application would have any prospect of success were the extension of time to be granted (also see *SZNZI v Minister for Immigration & Anor* [2010] FMCA 57 at [11]).
20. Section 477(2) is concerned with circumstances justifying a departure from the ordinary rule in s.477(1) that an application for judicial review must be lodged within 35 days of the date of the Tribunal decision. The remarks of Heerey J in *VQAN v Minister for Immigration & Multicultural & Ethnic Affairs* [2003] FCA 1541 at [23] suggesting that the longer the delay without reasonable explanation, the stronger would need to be the argument on the substantive merits are in point, notwithstanding that in *VQAN* his Honour was referring to the exercise of the discretion to refuse relief.
21. In this case the Applicants were legally represented when they filed an Amended Application as well as at the time of the hearing of their application for an extension of time. The Applicants had the opportunity to put their case at its highest. The grounds relied on were argued in full.
22. The grounds in the amended application are properly formulated by reference to contentions that, if made out, may well establish jurisdictional error, albeit that does not of itself suffice to establish prospects of success. These grounds raise issues of some complexity. On balance, while the absence of a satisfactory explanation for the delay is of concern, I am satisfied in all the circumstances that the merits of the grounds are such that in this particular case the extension of time sought should be granted as necessary in the interests of the administration of justice. However, for the reasons given below, the

grounds in the Applicant's substantive application are not made out. Hence the application should be dismissed.

23. There are three grounds in the amended application. At the hearing the solicitor for the Applicant indicated that ground one was not pressed. In order to consider grounds two and three (that the Tribunal "*denied the Applicant procedural fairness*" in that it "*based its decision on speculation and suspicion rather than reasonably probative evidence*" and that the "*decision was based upon illogical and irrational reasoning*") it is necessary to have regard to the applicable legislative provisions, the claims made by the Applicant and the Tribunal's reasons for decision.
24. Ms Nguyen is a citizen of Vietnam. She was married to the father of the Second Applicant (and of two other children) from 1975 until his death in 2004. On 31 December 2008 Ms Nguyen applied for a Spouse (or Partner) visa on the basis of her relationship with her sponsor, Mr Nguyen. She claimed she had married Mr Nguyen on 7 December 2008 while in Sydney on a visitor visa.
25. On 5 March 2009 the Department granted Ms Nguyen a Spouse (Provisional) Subclass 309 visa. Such visa enabled her to be in Australia on a temporary basis. She returned to Australia on 16 March 2009. As the holder of such visa the Applicant could be granted a permanent visa (a Class BC visa) in a range of circumstances, including, in particular, if the decision-maker was satisfied she was in an ongoing genuine and continuing relationship of over two years within the definition of "*spouse*" in reg.1.15A of the *Migration Regulations 1994* (Cth).
26. Regulation 1.15A of the Migration Regulations defines the term "*spouse*" as including persons in a married or de facto relationship. It requires that the decision-maker be satisfied that there is a mutual commitment to a shared life as husband and wife to the exclusion of all others, that the relationship is genuine and continuing and that the couple live together or do not live separately and apart on a permanent basis. Regulation 1.15A(3) requires consideration to be given to all the circumstances of the relationship, including financial aspects, the nature of the household, the social aspects and the nature of the persons' commitment to each other.

27. On 27 July 2010 a delegate of the First Respondent refused the Applicants a Class BC spouse visa. According to the delegate, on 1 May 2009 the Department had received information alleging that Ms Nguyen had entered a contrived marriage with Mr Nguyen. On 21 May 2010 the case was referred to the Departmental Bona Fides Unit for an assessment in relation to whether the relationship was genuine. On 10 June 2010 the Unit conducted a home visit at the Chester Hill residential address of the parties provided to the Department. A copy of a Minute from the Bona Fides Unit dated 18 June 2010 in relation to the home visit on 10 June 2010 was before the delegate and the Tribunal and is in evidence before the Court. The Minute recorded that Ms Nguyen was not present at the time of the home visit, that Mr Nguyen stated that the female clothing in the wardrobe in his bedroom belonged to his first wife and not to his “*new wife*” and that while he claimed that some of Ms Nguyen’s clothes were at her daughter’s home, he did not know the daughter’s address. He was unable to identify which female personal products, if any, belonged to Ms Nguyen. Mr Nguyen also told the investigators that his wife kept her passport with her and that she did not have any documentation or any mail come to the address, as all the bills were in his name.
28. In addition, when one of the officers asked Mr Nguyen’s son (who occupied one of the bedrooms) if Ms Nguyen lived there, he was recorded as “*promptly*” replying that she did not live there. When the question was repeated, the son again replied that the Applicant did not live there, stated that he did not know much about her and that his father was the best person to ask. The Minute recorded that Mr Nguyen’s explanation for his son’s evidence was that his children did not know much about his second or third wives and that Ms Nguyen only stayed at the address about four days a week and was otherwise at her daughter’s home. The Minute referred to a number of other concerns before expressing the view that based on the home visit the relationship “*appears non-genuine*”.
29. On 27 July 2010 the delegate concluded that she was not satisfied that Ms Nguyen and Mr Nguyen had demonstrated that they were in a genuine spousal relationship as defined in reg.1.15A of the Migration Regulations and refused the application for a spouse visa.

30. The Applicants sought review of the delegate's decision on 11 August 2010. By letter of 14 June 2012 the Tribunal invited the Applicants to a hearing on 3 August 2012 and to provide any additional information that they wished the Tribunal to consider. By letter of 27 July 2012 the Applicants' then solicitor/migration agent provided what was said to be further co-habitation evidence. In its reasons for decision the Tribunal referred to having received a range of material, including photographs of Mr and Ms Nguyen in a variety of social situations, Ms Nguyen's payslips, a letter indicating that her salary was paid into a joint bank account, various documents showing her address as the address in Chester Hill where the home visit was conducted and evidence of a statement for a joint bank account.
31. On 3 August 2012 both Ms Nguyen and her sponsor, Mr Nguyen, attended a Tribunal hearing at which they each gave evidence. The Tribunal also received oral evidence from the Second Applicant and from (another) Mr Nguyen who said he was an old friend of the sponsor.
32. On 8 August 2012 the Tribunal wrote to the Applicant under s.359A of the Act inviting her to comment on or respond to information it considered would be the reason or part of the reason for affirming the delegate's decision. In particular, the Tribunal raised with the Applicant evidence of a Vietnamese marriage certificate indicating that the sponsor had married a named woman in Vietnam on 8 May 2002 and a letter of 2 April 2010 from the Vietnamese Ministry of Foreign Affairs stating that that marriage certificate was genuine. The Tribunal put to the Applicant that while Mr Nguyen's oral evidence at the hearing was that he had been married only once before and that that marriage had ended in divorce in 1996, in the absence of evidence that Mr Nguyen had divorced his second wife, it appeared that he was legally married to somebody else when he married the Applicant in December 2008. It explained that this suggested that the Applicant could not satisfy the requirements for a married relationship and pointed out that there was an absence of evidence to suggest that she had been in a de facto relationship with the sponsor for 12 months prior to the date of the visa application or of compelling and compassionate circumstances for the grant of the visa. The Tribunal expressed general

concern about the credibility of Mr Nguyen's evidence, given its inconsistency with the Vietnamese records.

33. The Tribunal also put to the Applicant evidence that in May 2009 the sponsor had made a statement to the Vietnamese authorities concerning US\$14,500 given to him by two women in Vietnam and his proposal to repay such money and had explained that in 2001 he had received a total of US\$14,500 from two named women in order to arrange marriages for them to migrate to Australia, but "*it was not successful*". The Tribunal put to the Applicant that this information suggested that Mr Nguyen had been involved with promising to arrange contrived marriages for visa purposes and that this, with other information, could lead the Tribunal to infer that the sponsor's marriage to the Applicant was contrived for visa purposes only and to infer that the evidence concerning the relationship was not credible.
34. In addition, the Tribunal put to the Applicant the text of the report of the Bona Fides Unit in relation to the home visit to the Chester Hill address she had provided. This was said to be relevant because her evidence that she had lived at that address since her arrival in Australia appeared to be inconsistent with the information obtained by the Department in the home visit.
35. The Tribunal also put to the Applicant ASIC records in relation to the company she claimed she worked for in 2009 and the fact that her evidence appeared inconsistent with information from ASIC indicating the company did not exist at that time. The Tribunal also expressed concern about her claims that she was paid in cash, having regard to payslips referring to payments of \$286.13 on each occasion.
36. On 3 September 2012 the Applicant's adviser sought and was granted an extension of time to respond. On 14 September 2012 the adviser provided a translation of a response by Ms Nguyen and the sponsor to the issues raised in the s.359A letter.

The Tribunal decision

37. In its reasons for decision the Tribunal set out the relevant law and the evidence before it, including the evidence given at the Tribunal hearing and in response to the s.359A letter. Because of the nature of the

grounds relied on in the Amended Application it is necessary to refer to the findings and reasons of the Tribunal in some detail.

38. The Tribunal was not satisfied on the basis of the material before it that the Applicant was the spouse of the sponsor, Mr Nguyen, within the meaning of reg.1.15A of the Migration Regulations. First, the Tribunal considered whether the December 2008 marriage of Ms Nguyen to the sponsor, Mr Nguyen, was valid. While Ms Nguyen had provided a copy of her 2008 marriage certificate, the Tribunal accepted the genuineness of the Vietnamese marriage certificate showing that Mr Nguyen had married another person in May 2002. It did not accept his denial that he had entered such marriage. As there was no evidence or suggestion that his 2002 marriage had been annulled or that the parties had divorced, the Tribunal found that the sponsor was married to another person at the time he married the Applicant and hence that their marriage was void under the *Marriage Act 1961* (Cth).
39. The Tribunal went on to consider whether the Applicant and the sponsor were in a de facto relationship which met the requirements of reg.1.15A.
40. For a combination of reasons the Tribunal did not accept that Ms Nguyen and the sponsor were credible witnesses. It was not prepared to take the evidence of either of them at face value when it came to the nature of the relationship.
41. In reaching such conclusion the Tribunal found that the departmental home visit suggested that the parties were not cohabitating, that there was no real evidence that Ms Nguyen lived at the same address as the sponsor, that he did not have her contact details and did not know the address of her daughter where she was said to be spending a large part of her time. It also had regard to the fact that the sponsor's son was reported as having told the Department that the Applicant did not live at that address.
42. The Tribunal noted their explanations for issues raised by the home visit, including that the sponsor was drunk on the day of the home visit, that the Applicant had decided to place her documents in a suitcase under the bed without telling the sponsor and that his son was motivated by revenge in denying that the Applicant resided at the

home. However the Tribunal expressed several concerns about the credibility of both “*parties*” (which in context is clearly a reference to the Applicant and the sponsor), including the absence of any indication in the Department’s report that the sponsor was intoxicated during the home visit, the fact that he was coherent enough to respond to departmental questions and his clear recollection of the visit. The Tribunal did not accept that Mr Nguyen was so incapacitated by alcohol that he gave incorrect responses during the home visit.

43. The Tribunal found implausible the explanation that on that particular day Ms Nguyen had decided to place her personal items in a bag under the bed but had not told Mr Nguyen about it. It had regard to the fact that it was apparent from the home visit report that Mr Nguyen had been unable to show departmental officers any personal items or documents that belonged to Ms Nguyen.
44. In relation to the claim that Mr Nguyen’s son was motivated by revenge, the Tribunal stated “*While it may well be plausible for a teenage son to be unhappy with a father’s remarriage, the Tribunal does not accept that Mr Nguyen’s son would deny that Ms Nguyen actually lived at the address*”.
45. In addition, the Tribunal found that Mr Nguyen’s evidence that he had no knowledge of his marriage in 2002 was not credible in light of the marriage certificate verified by the Vietnamese authorities. It was of the view that Mr Nguyen had provided false information about his marriage in 2002 at the Tribunal hearing and in writing. Although it accepted that his response at the hearing may have been affected by his shock at seeing the 2002 marriage certificate, the Tribunal found that the fact that the sponsor maintained this response in his later written statement (in reply to the s.359A) reflected poorly on his credibility. It concluded that he had knowingly misled the Tribunal about his knowledge of the 2002 marriage.
46. Based on the Vietnamese police reports, the Tribunal also found that Mr Nguyen appeared to have a history of promising to sponsor people from Vietnam, taking their money and not following through with the sponsorship. It continued:

The tribunal accepts that that is (sic) in itself does not mean that his relationship with Ms Nguyen is not genuine as he actually went ahead with the sponsorship, as opposed to his custom of reneging on the sponsorships. However, the history does suggest that Mr Nguyen has been involved with promising to arrange contrived marriages for visa purposes. This information, when looked at in conjunction with other all the other information, leads the tribunal to infer that Mr Nguyen's marriage to Ms Nguyen is also contrived marriage for visa purposes only. The tribunal emphasises that this point alone is not determinative, but merely a part of a pattern.

47. The Tribunal had regard to concern about the Applicant's evidence about how she was paid, in particular her claim that by letter of 3 April 2009 she instructed Mushland Pty Ltd to direct her pay to a joint account. Such claim was said to be inconsistent with information from ASIC that Mushland Pty Ltd did not exist in April 2009. The Tribunal also found that the April 2009 letter was inconsistent with Ms Nguyen's evidence at the hearing that she was paid in cash by her employer. In addition it considered it implausible that Ms Nguyen was paid a specific weekly amount of \$286.13 in cash. The Tribunal observed that such concerns had not been addressed in the response to the s.359A letter. It found that the document of 3 April 2009 was never presented to any employer but was created recently and predated to give the impression that Ms Nguyen had joint financial arrangements with Mr Nguyen.
48. As indicated, because of the combination of these factors the Tribunal did not accept that the Applicant, Ms Nguyen, and the sponsor were credible witnesses.
49. The Tribunal had regard to the financial aspects of the relationship, but found no evidence that the parties had any joint liabilities or joint major assets. It did not accept that there was any significant pooling of financial resources, sharing of day-to-day household expenses or evidence that either party owed a legal obligation to the other. It accepted that a joint bank account existed, but found no evidence that this account was operated by both parties. Mr Nguyen's income from Centrelink went into his own account. The Tribunal placed limited weight on the existence of the joint account.

50. The Tribunal did not accept that at the time of the decision the Applicant and Mr Nguyen cohabitated. It observed that they did not have children together and found that there was no sharing of any housework.
51. The Tribunal accepted that the parties knew each other and attended social gatherings together. While Mr Nguyen had taken three overseas trips without Ms Nguyen since she arrived in Australia, the Tribunal placed no weight on this because she was on a bridging visa and therefore could not travel outside Australia.
52. The Tribunal had regard to the evidence of a friend of the sponsor and from Ms Nguyen's son (the Second Applicant) attesting to the relationship, but found that the friend's evidence was only very general and of limited use, that no other witnesses gave evidence, that there were no statutory declarations on file from others attesting to the relationship and that Mr Nguyen's son had given information to the Department that the Applicant did not live with Mr Nguyen.
53. Given its credibility concerns, the Tribunal was not prepared to accept that the Applicant and the sponsor knew each other from 1973 as had been claimed in the original visa application. It accepted that they had known each other at least since 2008, given that they married in that year. However the Tribunal was not satisfied that the Applicant and the sponsor had resided together since the Applicant's return to Australia as claimed. While it accepted that to a certain extent they were in communication with each other and had discussed aspects of the review application, the Tribunal found that this was solely in the context of achieving a favourable visa result for the Applicant and nothing to do with any genuine spousal relationship between her and the sponsor. The Tribunal did not accept that the parties saw the relationship as being long term.
54. The Tribunal acknowledged there were matters that, at face value, supported the view that the Applicant and the sponsor were in a relationship, but placed greater weight on the evidence of the home visit than on their evidence. It was of the view that the home visit exposed the reality of the situation. It was not satisfied that at the time of the decision the Applicant and the sponsor had a mutual commitment to a shared life as husband and wife to the exclusion of all

others and that the relationship was genuine and continuing. Nor was it satisfied that they lived together or not separately and apart on a permanent basis. The Tribunal concluded that at the time of the decision the sponsor and the Applicant were not in a de facto relationship within the meaning of reg.1.15A(2) and hence that Ms Nguyen did not satisfy the definition of spouse of Mr Nguyen within reg.1.15A. The Tribunal found that Ms Nguyen did not meet the applicable criterion for the grant of a subclass 100 visa. Nor did she meet the prescribed criteria in any other way. Accordingly her son could not satisfy the secondary criteria for the grant of such a visa. The Tribunal affirmed the decision not to grant the Applicants' partner visas.

Reasonably Probative Evidence Issue

55. Ground one in the amended application is not pressed. Ground two is that the Tribunal denied the Applicant procedural fairness. The particulars to this ground are that the Tribunal “*based its decision on speculation and suspicion rather than reasonably probative evidence*”.
56. In submissions it was clarified that this ground addressed the fact that the Tribunal was said to have based its decision in part on the evidence of the sponsor's son. The Tribunal had regard to the fact that the sponsor's son gave information to the Department that the Applicant did not live with his father and found that while it may be plausible for a teenage son to be unhappy with a father's remarriage, it did not accept that the son would deny that Ms Nguyen actually lived at the address. This finding was said to be simply speculation and/or guesswork for which there was no supportive reasonably probative evidence.
57. Reliance was placed by the Applicant on what was said by Deane J (with whom Evatt J agreed) in *Minister for Immigration & Ethnic Affairs v Pochi* (1980) 31 ALR 666 at 685 and 689 in an appeal on a question of law from a decision of the Administrative Appeals Tribunal (the AAT) reviewing a decision of the Minister for Immigration that Mr Pochi be deported. Relevantly, Deane J stated (at 685):

In my view, the Tribunal was bound, as a matter of law, to act on the basis that any conduct alleged against Mr Pochi which was

relied upon as a basis for sustaining the deportation order should be established, on the balance of probability, to its satisfaction by some rationally probative evidence and not merely raised before it as a matter of suspicion or speculation or left, on the material before it, in the situation where the Tribunal considered that, while the conduct may have occurred, it was unable to conclude that it was more likely than not that it had.

58. His Honour pointed out that the AAT was obliged to conduct its review in accordance with the requirements of natural justice and that such requirements must depend on the circumstances of the case, including the nature of the inquiry, the rules under which the tribunal was acting and the subject matter that was being dealt with (at 686 – 687).

59. Deane J continued (at 689):

It would be both surprising and illogical if, in proceedings before a statutory tribunal involving an issue of the gravity of deportation of an established resident, the rules of natural justice were restricted to the procedural steps leading up to the making of a decision and were completely silent as to the basis upon which the decision itself might be made. There would be little point in the requirements of natural justice aimed at ensuring a fair hearing by such a tribunal if, in the outcome, the decision-maker remained free to make an arbitrary decision. If decision, in such a case, were to be based on mere suspicion or speculation, the rules of procedure aimed at governing the process of making findings of material fact would involve no more than a futile illusion of fairness.

60. His Honour agreed that, as Diplock LJ had stated in *R v Deputy Industrial Injuries Commissioner; ex parte Moore* [1965] 1 QB 456; 1 or ER 81 at 688 – 689, “it is an ordinary requirement of natural justice that a person bound to act judicially “base his decision” upon material which tends logically to show the existence or non-existence of facts relevant to the issue to be determined”.

61. The solicitor for the Applicant pointed out that this approach had recently been approved by a Full Court of the Federal Court in *Rawson Finances Pty Ltd v Commissioner of Taxation* (2013) 296 ALR 307; [2013] FCAFC 26 at [62], [66] and [84] and submitted that the principles expressed therein applied generally to tribunals not bound by the rules of evidence.

62. In *Rawson Finances* what was in issue was whether a particular finding of the AAT was or was not open on the evidence or whether there was no evidence capable of supporting that finding. Before considering that issue Jessup J concluded (at [62]) that having regard to the legal framework within which the AAT's fact-finding function was set, while it was not a court and was not bound by rules of evidence, "[i]t must, however, proceed by reference to 'rationally probative evidence' rather than on mere 'suspicion or speculation': Minister for Immigration and Ethnic Affairs v Pochi (1980) 31 ALR 666 at 685; 4 ALD 139 at 156; 1A IPR 708 at 724.'" However his Honour suggested that if the particular finding in issue had been made by inference, no error of law would be established as long as there was some basis for the inference. Jessup J pointed out at [66] that:

In hard cases, it is often the function of a tribunal of fact to resolve controversies as between relatively "evenly balanced" evidentiary material. Once a finding is made one way or the other, it resolves the issue of even balance. It is for the Tribunal of fact to make that finding, and no error of law is disclosed merely by reason that the finding was made upon primary materials which appeared to be evenly balanced. It is, of course, another matter altogether if it appears that the finding was the result of guesswork or conjecture, but such a conclusion is not to be reached merely because the Tribunal had evenly balanced material before it.

63. In the same case Jagot J (with whose reasons Nicholas J agreed) stated (at [83] – [84]):

... if there is some evidence which reasonably admits of different conclusions as to the existence of a fact or not, the finding of that fact or the failure to find that fact does not involve a question of law. Hence, it is only whether the evidence could have supported the factual finding which constitutes a question of law. By contrast, the question whether evidence should or should not have led to a finding of fact is not a question of law. In the present context "evidence", a term used in civil litigation, means the whole of the material before the Tribunal.

The distinction between evidence or material which could support a factual finding and evidence or material which should or should not have supported such a finding is fundamental to the exercise of jurisdiction, which is limited to questions of law. When courts refer to there being "no probative" evidence to support a finding

or a finding not being “reasonably open” or “open” on the evidence (as in Australian Broadcasting Tribunal v Bond at 359/360) or it being necessary that a finding be based on “some probative material or logical grounds” and that a finding not be ‘completely arbitrary’ (as in Australian Broadcasting Tribunal v Bond at 366 and 367, Kostas v HIA Insurance Services Pty Ltd at 16, Minister for Immigration & Multicultural Affairs v Eshetu [1999] 197 CLR 611; [1999] HCA Q1 at 145 and Minister for Immigration & Multicultural Affairs v SGLB [2004] 78 ALD 224; [2004] HCA 32 at 38), the courts are not inviting consideration of whether a finding should or should not have been made. They are considering the anterior question whether the evidence reasonably admitted the making of the finding; that is, whether the evidence could support the finding. Hence, if there is no probative evidence of fact and no logical grounds to support the fact, the finding of that fact will involve an error of law. But where there is some probative evidence of a fact and some logical ground to support the fact, the finding of that fact will not involve error of law. The formula “some probative material or logical grounds” does not convert questions of fact into questions of law.

64. Her Honour explained that, as Buchanan J had noted in *Tisdall v Webber* (2011) 193 FCR 260; [2011] FCAFC 76 at [125], there is “a difference between a finding not reasonably open on the evidence and a finding reached on other than logical grounds” and suggested that while the former involved findings not supported by some evidence and was always an error of law, the latter merely involved faulty reasoning and generally would not be characterised as an error of law. Jagot J stated that where what was suggested was illogicality or faulty inferential reasoning, the test was not whether there was an error in logic or reasoning, but whether there was no foundation for the conclusion reached (see *Minister for Immigration and Citizenship v SZMDS and Another* (2010) 240 CLR 611; [2010] HCA 16 at [130], [131] and [135]).
65. The Applicant acknowledged that s.357A of the Act stated that Division 5 of Part 5 was taken to be an exhaustive statement of the requirements of the natural justice hearing rule in relation to the matters it dealt with, but submitted that as the manner in which the Tribunal made its decision was not a matter dealt with in Division 5, s.357A did not operate to displace the operation of common law principles of procedural fairness (see *Saeed v Minister for Immigration*

and Citizenship (2010) 241 CLR 252; [2010] HCA 23 at [42] and *Khan v Minister for Immigration and Citizenship and Another* (2011) 192 FCR 173; [2011] FCAFC 21 at [39] per Buchanan J).

66. In support of this ground the Applicant acknowledged that the Tribunal had described accurately what the sponsor's son was said to have said during the home visit. However issue was taken with the Tribunal's finding that it did not accept that the sponsor's son would deny that the Applicant actually lived at the Chester Hill address. There was said to be nothing of a probative nature before the Tribunal to support the finding that, even if the son did not like the Applicant (as claimed in the response to the s.359A letter), he would not have denied that she lived with his father. This finding was said to be a crucial finding that went to the heart of the decision. It was said to have been based on mere speculation or guesswork.
67. The First Respondent submitted that there was no substance to the Applicant's assertion that the Tribunal based its decision on "*speculation and suspicion*" rather than reasonably probative evidence. In written submissions it appeared to be contended that the ultimate conclusion reached by the Tribunal was open to the Tribunal on the basis that it had regard to all the evidence before it and gave consideration to all the circumstances of the relationship as required by reg.1.15A(3). More particularly, it was submitted that the Tribunal's finding about the evidence of the sponsor's son was open to it on the evidence before it and was not the result of "*guesswork*", speculation or suspicion rather than rationally probative evidence. In the alternative, it was submitted that if there was such an error it would not be capable of giving rise to a breach of the procedural fairness obligations of the Tribunal. It was submitted that the provisions of Division 5 of Part 5 of the Act were exhaustive as to the extent of any requirement of the sort alleged by the Applicant, that the Applicant had not pointed to any authority in support of the proposition that basing findings on "*reasonably probative evidence*" formed part of the rules of procedural fairness applicable to the Migration Review Tribunal and that the only grounds on which the Court had jurisdiction to review the evidentiary basis for the Tribunal's decision or the Tribunal's reasoning in relation to the material before it were the "*no evidence*" and "*irrationality*" grounds, neither of which was made out.

68. For the reasons that follow I am not satisfied that it has been established that the Tribunal based its decision on speculation or guesswork rather than reasonably probative evidence in the manner contended for by the Applicant.
69. Taking the Applicant's case at its highest, I have assumed for present purposes that a failure to base findings on reasonably probative evidence could amount to a denial of procedural fairness constituting jurisdictional error on the part of the Migration Review Tribunal. The difficulty that faces the Applicant is that, as the First Respondent submitted, there is no substance in the assertion that the Tribunal based its decision on speculation and suspicion rather than reasonably probative evidence. Hence it is unnecessary to consider issues such as the scope of the Tribunal's procedural fairness obligations, the effect of s.357A of the Act or the extent to which the principles considered in *Pochi* and *Rawson Finances* apply to the Migration Review Tribunal.
70. The Tribunal's consideration of the sponsor's son's evidence is in the part of the decision in which it expressed concern about the credibility of both the Applicant and the sponsor. The Tribunal accepted that "*it may well be plausible for a teenage son to be unhappy with a father's remarriage*" but did "*not accept that Mr Nguyen's son would deny that Ms Nguyen actually lived at the address*".
71. The Tribunal had before it evidence that included the claims made by the Applicant and the sponsor that they lived together at the Chester Hill address, the Minute of the home visit, the evidence at the hearing and the response of both the sponsor and the Applicant to the s.359A letter.
72. The Minute of the home visit recorded that when the sponsor's then 22-year-old son (who was at the premises and occupied one of the bedrooms) was asked by a departmental officer "*if the applicant lived there*" he "*promptly replied that she did not live there. The question was repeated and the son looked at the name and replied that the applicant did not live there and added that he does not know much about the applicant. He stated that his father was the best person to ask about those questions. Officers thanked the son and he returned to his room*".

73. During the home visit the sponsor explained this response by stating that *“his children did not know much about his second or third wives. He stated that they only recalled details of his first wife, [their] mother”*.
74. According to the Tribunal’s account of the hearing, it put to Ms Nguyen the fact that the sponsor’s son appeared to indicate that she did not live at the Chester Hill address. Her response was that when she and her son moved in, her son needed to share a bedroom with the sponsor’s son and that as a result the sponsor’s son did not like her and her son. The Tribunal recorded that Ms Nguyen suggested that the sponsor’s son’s response *“was motivated by revenge”*.
75. The Tribunal also asked the sponsor about the home visit and noted that his son appeared to have no knowledge of Ms Nguyen. It recorded that his response was *“that his son is a rough kid and speaks English. His wife, Ms Nguyen, does not speak English and therefore there has not been much contact or communication between the two ... that since he became married, his son’s life has been disturbed because he had to share a bedroom with Ms Nguyen’s son and his son suddenly didn’t like it”*. However he also told the Tribunal that Ms Nguyen spent a minimum of 4 to 5 days a week at his place.
76. The sponsor’s son did not give evidence to the Tribunal.
77. In the s.359A letter the Tribunal again raised with the Applicant the evidence of the Minute of the home visit (including the denial by the sponsor’s son that she lived at his home) and explained that it was relevant because she had given evidence she had lived at the Chester Hill address since her arrival in Australia, that this appeared to be inconsistent with the information obtained by the Department in its home visit in June 2010 and that this could lead the Tribunal to infer that the Applicant’s evidence concerning her living arrangements was not credible, to find that she did not live with the sponsor and not to accept her evidence about other aspects of her relationship with Mr Nguyen.
78. The response to the s.359A letter was signed by Ms Nguyen as well as the sponsor, albeit expressed as an explanation by the sponsor. After explanations for other matters observed during the home visit (such as

the absence of the Applicant at the premises, the sponsor's failure to identify any clothing or personal possessions of Ms Nguyen as well as the absence of any of her documentation, it was stated:

At last, the Department presented a photo of my wife Nguyen Thi Vuong to my son and asked my son whether she is his mother, my son then said no and he confirmed he does not know the lady in the photo. I was so sad when my son replied so to the Department because even if he does not like my current wife Nguyen Thi Vuong, he could not say that he does not know her. I would like to tell the Tribunal that my place is quite small, after marriage, my wife Nguyen Thi Vuong and I took her son to come to my place to live with us. As there are more people living in a small house, my son feels uncomfortable and his life has been changed since then.

I understand my son's personality. After I divorced my ex wife in 1996, my son has been lacking in his mother's love. In his eye, I am everything for him. He did not want to share me, share my love to anyone else. He is afraid that if I married to another woman, I could not take care of him anymore. My son does not like when I married Ms Nguyen Thi Vuong and took her son to live with me at my place. I have tried to talk to my son for a long time, however my son does not understand and sympathy for me. During the time living together, my son and my current wife's son – Hoang Tuan Hiep, do not get along very well. My wife's son asked for our permission for him to move out in order to avoid conflicts in our family.

My wife's son then moved out to live with his elder sister in Villawood. He usually comes to our place to visit us on weekend.

We would ask the Tribunal to understand that as my son does not want me to marry Ms Nguyen Thi Vuong, he replied so to the Department with the purpose that we would not live together any more then his life would become as before and I may just love him and care for him only like before. My son does not realize that 4 or 5 years later, he will get marriage and has his own family then he will have no time to take care of me. Therefore, who will take care of me when I am in sickness? who will talk to me when I am alone? My son does not realise that at that time, my wife is the only one who can share the rest of my life together. My wife and I would ask the Tribunal to please consider our current situation.

79. Relevantly, the Tribunal found at [64] that Mr Nguyen's son was reported to have told the Department that Ms Nguyen did not live at the

Chester Hill address. There was clearly an evidentiary basis for this finding. The Applicant's concern, as explained in submissions, is with the Tribunal's statement that:

While it may well be plausible for a teenage son to be unhappy with a father's remarriage, the tribunal does not accept that Mr Nguyen's son would deny that Ms Nguyen actually lived at the address.

80. Read in context, it is clear that in this part of its findings and reasons the Tribunal was addressing explanations provided by the Applicant and the sponsor for the son's denial during the home visit that Ms Nguyen lived at the address he and his father occupied. The Tribunal did not accept the explanations for why the sponsor's son would deny that Ms Nguyen lived at that address if she did in fact live there.
81. At the hearing and in the s.359A letter the Applicant and the sponsor had been given the opportunity to provide explanations for his son's denial that Ms Nguyen lived at the Chester Hill address. In addition to the various explanations given for the son's denial, the Tribunal had before it the departmental evidence of what the son had said during the home visit and as to what otherwise occurred during the home visit.
82. The Tribunal's failure to accept or to be satisfied that the sponsor's son would deny that Ms Nguyen actually lived at the address for the reason given by way of explanation (in particular that he was motivated by revenge) is not such that it can be said that the Tribunal based its decision on speculation or guesswork, rather than rationally or reasonably probative evidence in a manner constituting jurisdictional error. What was in issue was whether the Tribunal accepted the son's undisputed evidence during the home visit (in circumstances where he lived in the home and other matters observed during the visit also suggested Ms Nguyen and the sponsor were not co-habiting) or accepted the explanations from Ms Nguyen and the sponsor suggesting that the son had lied during the home visit.
83. A fair reading of the Tribunal's decision discloses that the Tribunal had regard to all the evidence of the home visit and considered the Applicant's (and the sponsor's) suggestions as to why the son would say the Applicant did not live with the sponsor. Its failure to accept the

Applicant's explanation that the sponsor's son had lied to the departmental officer about whether the Applicant lived in the Chester Hill house for any of the reasons suggested was open on the evidence before it. It cannot be characterised as the result of "*guesswork*", "*speculation or suspicion*" in the sense considered in *Pochi* and *Rawson Finances*.

84. Even if a different decision-maker might have reached a different conclusion as to whether or not he or she accepted that the sponsor's son would deny that the Applicant actually lived at his address, the fact that the evidence would reasonably admit of a different conclusion in that respect does not suffice to establish error of law (see *Rawson Finances* at [83] per Jagot J). The evidence before the Tribunal reasonably admitted its conclusion that it did not accept that the sponsor's son would deny that Ms Nguyen lived at the address for the reasons suggested by the Applicant and the sponsor. There was a clear evidentiary basis for the Tribunal's finding that the son stated that Ms Nguyen did not live at his address. There were logical grounds for the Tribunal to find that, despite unhappiness with his father's marriage, it did not accept that the son would have falsely stated to Departmental officers that Ms Nguyen did not live at the Chester Hill address (see *Rawson Finances* at [66] per Jessup J). The evidence before the Tribunal reasonably admitted such a finding.
85. This is not a case in which the principles in relation to the absence of probative evidence of a fact assist the Applicant. Nor is there any support for the proposition that the Tribunal's finding in this respect was based on mere conjecture. Rather, the Tribunal did not accept an explanation given for the clear evidence that the sponsor's son had stated that the Applicant did not live with him and his father.
86. Insofar as the Applicant initially appeared to take issue with the Tribunal's finding that the sponsor's son gave information to the Department that Ms Nguyen did not live with his father there is no basis for any contention that such finding was not based on rationally or reasonably probative evidence. As appeared to be conceded in post-hearing submissions, this finding was based on a reported conversation between the sponsor's son and an officer of the Department during the home visit.

87. Insofar as issue appeared to be taken with the Tribunal's lack of satisfaction that Ms Nguyen and the sponsor cohabitated or had resided together since Ms Nguyen's arrival in Australia or that they were in a relationship that met the requirements of reg.1.15A, as set out above such findings were based on a number of aspects of the material before the Tribunal. It cannot be said that the evidence could not have supported such a finding in the sense considered by Jagot J in *Rawson Finances* at [83] – [84] or that such findings were based on “*suspicion or speculation*” rather than on “*some rationally probative evidence*” as considered in *Pochi* by Deane J. Similarly, the Tribunal's credibility findings were open to it for the reasons which it gave.
88. In supplementary submissions the Applicant raised the fact that the Tribunal did not make any inquiries. However this is not a case in which the Tribunal was under an obligation to make inquiries in the sense considered in *Minister for Immigration and Citizenship v SZIAI* (2009) 83 ALJR 1123; [2009] HCA 39. It was for the Applicant to put evidence before the Tribunal in support of her case. Nor is it to the point that the Tribunal did not itself seek out and take evidence from the sponsor's son before not accepting the Applicant's explanation for what the sponsor's son had said during the home visit.
89. There is no factual foundation for the allegation of reasoning based on speculation or guesswork. Hence, it is unnecessary to address the Minister's alternative argument about the scope of procedural fairness obligations of the Tribunal, because even if the Tribunal's procedural fairness obligation does extend to basing findings on “*reasonably probative evidence*”, there was no failure to accord such procedural fairness in this case. This ground is not made out.

Illogical and Irrational Reasoning Issue

90. The third ground in the amended application is that the Tribunal's decision was based on illogical and irrational reasoning. The particulars to this ground take issue with the Tribunal's reasoning in relation to one of the matters of concern to it about the credibility of the sponsor and Ms Nguyen. The Tribunal stated:

Based on the Vietnamese Police reports, Mr Nguyen appears to have a history of promising to sponsor people from Vietnam,

taking their money, and then not following through with the sponsorships. The tribunal accepts that is in itself does not mean that his relationship with Ms Nguyen is not genuine as he actually went ahead with the sponsorship, as opposed to his custom of reneging on the sponsorships. However, the history does suggest that Mr Nguyen has been involved with promising to arrange contrived marriages for visa purposes. This information, when looked at in conjunction with all the other information, leads the tribunal to infer that Mr Nguyen's marriage to Ms Nguyen is also contrived marriage for visa purposes only. The tribunal emphasises that this point alone is not determinative, but merely a part of a pattern.

91. The particulars to ground three are that the use of this reasoning as a “credibility concern” was illogical and/or irrational as:

- (a) it is not part of a pattern but significantly different from the pattern.*
- (b) on its face, it supports that the relationship between Mr Nguyen and Ms Nguyen is genuine.*
- (c) it is not a matter going negatively to credit but is a matter going positively to credit.*

92. The Applicant acknowledged that the test for illogical reasoning in *SZMDS* as stated in the judgment of Rares J in *SZOOR v Minister for Immigration and Citizenship and Another* (2012) 202 FCR 1; [2012] FCAFC 58 (at [15]) is as follows:

The approach to irrationality or illogicality dictated by the authorities in the High Court appears to be that even if the decision-maker's articulation of how and why he or she went from the facts to the decision is not rational or logical, if someone else could have done so on the evidence, the decision is not one that will be set aside. It is only if no decision-maker could have followed that path, and despite the reasons given by the actual decision-maker, that the decision will be found to have been made by reason of a jurisdictional error.

93. Moreover it was conceded that the Applicant could only succeed if no decision-maker could have followed the path taken by the Tribunal in this respect.

94. The Applicant submitted that the illogicality lay in the Tribunal not drawing an inference that the relationship was genuine in circumstances where the Tribunal was said to have pointed out at the start of this part of its reasoning, the pattern, if there was one, was for Mr Nguyen to promise sponsorship and then not go through with the sponsorship, whereas in this case the sponsorship did go through and an application was lodged on the basis of the marriage. In other words, it was submitted that the sponsor's marriage to Ms Nguyen was not part of a pattern but it was the antithesis of the suggested pattern or was outside the pattern. It was contended that rather than leading the Tribunal to doubt the genuineness of the relationship between Ms Nguyen and Mr Nguyen, the only logical and rational outcome of such circumstance was that the Tribunal should have inferred that the relationship was genuine.
95. The short answer to this ground is that it was open on the evidence before the Tribunal for it to infer that a person who had a history of fraudulent conduct in respect of visa applications and sponsorships was again engaging in fraudulent sponsorship activity, even if the *modus operandi* differed on this occasion.
96. It is not in dispute that it was open to the Tribunal to find that the history of Mr Nguyen as recorded in the Vietnamese Police reports suggested that he had been involved in arranging contrived marriages for visa purposes. The Tribunal raised this issue in the s.359A letter. It was addressed in the reply to the s.359A letter by an explanation from Mr Nguyen that after he had been arrested on return to Vietnam in 2009 and told that he owed money to women, he realised that he did not want to marry those women and obtained money in order to pay these debts.
97. Moreover, insofar as the Tribunal had regard to "*the history*" this would include not only the Vietnamese Police reports in relation to sponsorships that Mr Nguyen did not follow through with, but also the information about Mr Nguyen's marriage in 2002 (to a person with the same name as one of the Vietnamese women from whom he was said to have received money in order to arrange a marriage for her to migrate to Australia). In light of such information it cannot be said that there was any irrationality or lack of logic in the Tribunal's view that

the “*history*” suggested that Mr Nguyen had been involved with promising to arrange contrived marriages for visa purposes or in its inference that his marriage to Ms Nguyen was also a contrived marriage for visa purposes only.

98. Even if Mr Nguyen’s 2002 marriage was to some person other than the woman to whom he owed money, in its s.359A letter the Tribunal had put to the Applicant the information from the Vietnamese authorities that was said to suggest that Mr Nguyen had been involved with promising to arrange contrived marriages for visa purposes and pointed out that when looked at in conjunction with other information referred to in the letter (which included the information about the 2002 marriage as well as the home visit) this information could lead the Tribunal to infer that the sponsor’s marriage to the Applicant was a contrived marriage for visa purposes only and that he was not credible. In reply to the s.359A letter, Mr Nguyen stated that he realised the woman he married in 2002 married him for migration purposes, but admitted she gave him money. He also appeared to suggest that his relationship with the Applicant was genuine.
99. Importantly, it is apparent that in its findings the Tribunal accepted that Mr Nguyen’s past history did not *of itself* mean that his relationship with Ms Nguyen was not genuine. It specifically referred to the fact that in this case he went ahead with the sponsorship, as opposed to what was said to be his custom of reneging on sponsorship. Hence the Tribunal’s reference to a “*pattern*” of activity is to be seen in light of the fact that it clearly recognised that there were differences in the precise nature of Mr Nguyen’s activities in relation to sponsoring spouses from Vietnam. Furthermore the Tribunal did not make its adverse credibility finding, or its finding that the marriage between Mr Nguyen and Ms Nguyen was a contrived marriage for visa purposes, based only on his past history. It had regard to all the other information before it.
100. There is no substance in the contention that the Tribunal’s reasoning was indicative of jurisdictional error in the manner contended for in ground three of the amended application. It was open to the Tribunal in considering the credibility of the Applicant and the sponsor and in not being satisfied that the relationship was genuine to have regard to

the fact that the sponsor had previously engaged in fraudulent sponsorship conduct together with all the other evidence before it. The Tribunal recognised that on this occasion the sponsor was engaging in slightly different activity in relation to sponsorship. It cannot be said there was only one conclusion open on the evidence (being that the relationship between the sponsor and Ms Nguyen was genuine) to which the decision-maker did not come. Nor can it be said that the “*process of reasoning*” or the findings the Tribunal made were not open on the evidence or the material before it (see *SZMDS* at [133]) or that there was no logical connection between the evidence and the inferences or conclusions drawn by the Tribunal in the sense considered in *SZMDS* and *SZOOR*. Indeed, as Rares J pointed out in *SZOOR* at [15] even if the Tribunal’s “*articulation of how and why [it] went from the facts to the decision is not rational or logical, if someone else could have done so on the evidence, the decision is not one that will be set aside*”. In this case it cannot be said that “*no decision-maker could have followed that path*” (*SZOOR* at [15]).

101. This ground is not made out.
102. As neither of the grounds relied on by the Applicant has been established the application must be dismissed.

I certify that the preceding one-hundred and two (102) paragraphs are a true copy of the reasons for judgment of Judge Barnes

Associate:

Date: 24 September 2013